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BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
KING COUNTY DEPARTMENT OF
PUBLIC WORKS, SOLID WASTE
DIVISION,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY and STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY,

Respondents.

PCHB Nos. 84-295, 84-296,
85-12, and 85-31

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

This matter, the appeal of four Notices of Violation and four \$1,000 civil penalties for allowing the emission of an air contaminant from the Cedar Hills Landfill site in the Maple Valley-Issaquah area on July 25, August 15, August 22, and December 6, 1984, came on for hearing before the Pollution Control Hearings Board on April 2, 1985, in Seattle, Washington. Seated for and as the Board were Lawrence J. Faulk (presiding), Gayle Rothrock, and Wick Dufford. The proceedings

1 were officially reported by Duane W. Lodell. Respondent elected a
2 formal hearing pursuant to RCW 43.21B.230.

3 Appellants were represented by Jack Johnson, Deputy Prosecuting
4 Attorney for King County. Respondent Agency was represented by its
5 attorney Keith D. McGoffin.

6 By agreement the testimony of witnesses was by affidavit and thus
7 there was no cross examination. Exhibits were entered. Argument was
8 heard and briefed. From the testimony, evidence, and contentions of
9 the parties, the Board makes these

10 FINDINGS OF FACT

11 I

12 Respondent PSAPCA, pursuant to RCW 43.21B.260, has filed with this
13 Board a certified copy of its Regulation I, and all amendments
14 thereto, which is noticed.

15 II

16 Appellant King County owns and operates a sanitary landfill--the
17 Cedar Hills Landfill--located at 16645-228th Avenue SE, Maple Valley,
18 Washington. They have owned and operated the site since 1964 through
19 their Department of Public Works Division of Solid Waste. The Solid
20 Waste Division operates six transfer stations, waste transfer
21 vehicles, some rural landfills and the subject landfill site.

22 Waste and garbage is ultimately brought to the subject site,
23 compacted, piled, covered, and its gas vented from 15 active flare
24 jets. The site is actively operated seven days a week at least eight
25 and one-half hours a day, is patrolled at night, and is open all

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1 seasons of the year, receiving 2,600 tons of residential and
2 commercial garbage annually.

3 III

4 At times some odors emanate from the landfill and waft across the
5 site boundaries into a neighborhood nearby. Such odors may be either
6 from new garbage or decomposing garbage waste which exists under
7 anaerobic conditions.

8 IV

9 In the afternoon of July 25, 1984, acting on a complaint from a
10 neighbor who lives northwest of the landfill, respondent Agency's
11 inspector visited and spoke with the complainant. The inspector took
12 a written complaint in which the complainant described the problems as
13 follows: "The air smells awful like bad garbage." The complainant
14 also stated that the effect was "nauseating."

15 Later in an affidavit relating to the event, the complainant
16 stated that she is able to distinguish garbage from other odors, that
17 her attention was drawn to the landfill because of "an offensive
18 rotten garbage smell on her property which permeates her yard and
19 home," that she and her family have experienced "unreasonable
20 interference with the enjoyment of the outdoors on their property to
21 the point of becoming ill on numerous occasions," and that she feels
22 that

23 the obnoxious odors from the appellant's landfill has
24 unreasonably interfered with the basic right of
25 enjoyment of her and her family's life and property.

26 The inspector, at the time he arrived, rated the odor at "2" on

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1 an odor rating scale, which is as follows:

2 0--No detectable odor

3 1--Odor barely detectable

4 2--Odor distinct and definite, any unpleasant characteristics
5 recognizable

6 3--Odor strong enough to cause attempts at avoidance

7 4--Odor overpowering, intolerable for any appreciable time

8 This rating scale is used by PSAPCA not as a regulatory standard, but
9 as a shorthand method for preserving impressions for evidentiary
10 purposes. The inspector described the odor verbally in these terms:

11 The odor had the unpleasant characteristics of
12 decaying organic material, putrescent garbage.

13 He stated that the wind was blowing from the direction of the
14 landfill towards the complainant's homesite. He also noted that the
15 only place he could detect the odor was downwind of the landfill.

16 PSAPCA's inspector proceeded to the landfill and issued Notice of
17 Violation 20044. On August 23, 1984, Notice and Order of Civil
18 Penalty No. 6127 was issued for \$1,000. The penalty was appealed to
19 this Board on October 22, 1984, and became our cause number PCHB No.
20 84-295.

21 V

22 On the evening of August 15, 1984, acting on complaints another
23 respondent's Agency's inspectors visited and spoke with two neighbors
24 who live approximately one-half mile east of the landfill. The
25 inspector took written complaints from each and recorded his own

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1 reactions.

2 By affidavit both complainants stated on ability to distinguish
3 odors and the conviction that what they smelled was garbage. One
4 stated that the odor so permeated her yard as to make her a prisoner
5 in her own house. She went on to say that she has personally
6 experienced

7 loss of sleep and appetite, nose and throat
8 irritation, loss of property value, mental anguish,
9 anxiety over health effects and unreasonable
10 interference with enjoyment of property, having
11 guests or opening windows during hot summer days
12 because of the smell from the Cedar Hills landfill.

13 The other complainant said that the odor "made it unbearable to go
14 outside." He described his personal response to the odor as follows:

15 nausea, loss of property value, mental anguish,
16 anxiety over health effects, smelly clothes and
17 furnishings, and unreasonable interference with
18 enjoyment of property, having guests, and opening
19 doors and windows at will...

20 PSAPCA's inspector arrived at the first complainant's home at
21 about 7:15 p.m. Over time he noted odors "gradually increased and
22 became distinct and noticeable with unpleasant characteristics." By
23 8:30 p.m. he judged that, "the odor was strong enough to cause a
24 person to attempt to avoid it completely." He stated further:

25 The intensity, quality and pervasiveness of the odor
26 was sufficient to include nausea, curbed appetite,
27 nose and throat irritation, and generally offended
the sense of smell and taste.

He stated that the wind was blowing from the landfill toward
complainant's property.

At 9:25 p.m. the inspector visited the second complainant's home

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1 and detected the same odor of rotting garbage, with recognizeable
2 unpleasant characteristics. Again the wind was blowing from the
3 landfill toward the complainant's property.

4 Notices of Violations numbers 20094 and 20095 were issued. On
5 September 24, 1984, Notice and Order of Civil Penalty No. 6140 was
6 issued for \$1,000. The penalty was appealed to this Board on
7 October 22, 1984, and became our cause number PCHB No. 84-296.

8 VI

9 On the evening of August 22, 1984, again regarding the two odor
10 complaints, a PSAPCA inspector visited a home near the Cedar Hills
11 Landfill.

12 By formal written complaint the odor was described a a "very bad
13 dump smell." The complainant, by affidavit, said that since 1981 he
14 had experienced a "nauseating garbage odor which permeates his
15 property." He stated that the "quality of life is severely affected
16 by the nauseating smell of rotten garbage with increasing
17 regularity." On the date in question, he experienced nausea.

18 PSAPCA's inspector was advised by the other complainant that the
19 odor that evening was so severe that he was nauseated and quit working
20 out of doors. The inspector, on site at both complainants' homes,
21 detected a rotten garbage odor with unpleasant characteristics,
22 offensive to his taste and smell. He stated that

23 the intensity, quality and pervasiveness of the
24 garbage odor...was sufficiently present to induce
25 nose irritation, nausea, anxiety, and generally
26 offended the sense of smell.

27 Notice of Violation 20403 was issued. On December 12, 1984,

1 Notice and Order of Civil Penalty No. 6183 was issued for \$1,000. The
2 penalty was appealed to this Board on January 10, 1985, and became our
3 cause number PCHB No. 85-12.

4 VII

5 On the evening of December 6, 1984, a PSAPCA inspector
6 investigated another odor complaint in the vicinity of the landfill.
7 The formal written complaint stated that "the air smells rotten and it
8 is nauseating to be outdoors." The smell was identified as a
9 "definite garbage odor." By affidavit, the complainant referred to
10 "an offensive rotten garbage smell on her property which permeates her
11 yard and home" and asserted unreasonable interference with property
12 "to the point of becoming ill on numerous occasions and having to go
13 outside to avoid becoming ill."

14 PSAPCA's inspector, at complainant's home, detected an odor
15 "strong enough to cause attempts at avoidance and...offensive to his
16 taste and smell."

17 The wind was westerly and the property was past the landfill.

18 The inspector patrolled the vicinity of the landfill and detected
19 garbage odors strong enough to cause attempts at avoidance east of the
20 landfill. Notice of Violation 20410 was issued. On January 25, 1985,
21 Notice and Order of Civil Penalty No. 6201 for \$1,000 was issued. The
22 penalty was appealed to this Board on February 26, 1985, and became
23 our cause number PCHB No. 85-12.

24 VIII

25 The appellant County does not contend that the effects experienced

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1 on the dates in question did not occur. Neither did the County show
2 that any of the complainants or inspectors possessed idiosyncratic
3 sensibilities.

4 The Board, therefore, finds on the record before it, that the
5 odors complained of were, in fact, offensive to persons of normal
6 sensitivity and that they did, in fact, unreasonably interfere with
7 the enjoyment of life and property on each of the dates involved here.

8 IX

9 Any Conclusion of Law which is deemed a Finding of Fact is hereby
10 adopted as such.

11 From these Findings of Fact, the Board comes to these

12 CONCLUSIONS OF LAW

13 I

14 The Board has jurisdiction over these persons and these matters.
15 Chapters 43.21B and 70.94 RCW.

16 II

17 The notices of penalty at issue assert violations of both Section
18 9.11(a) of PSAPCA Regulation I and WAC 173-400-040(5). Since we
19 decide that Section 9.11(a) was violated, we need not consider WAC
20 173-400-040(5).

21 III

22 On July 25, 1984, August 14, 1984, August 22, 1984, and
23 December 6, 1984, odors emanating from the Cedar Hills Landfill site
24 wafted onto nearby residential properties and had such effects on
25 human health and the enjoyment of life and property as to violate
26 Section 9.11(a).

IV

King County alleges that (1) PSAPCA has failed to cite King County under the proper section of Regulation I; (2) that Section 9.11(a) proscribes conduct less culpable than that proscribed in RCW 70.94.040 and is therefore invalid; (3) that PSAPCA has failed to adopt its odor test by rule; (4) that PSAPCA's odor standards are unconstitutionally vague; and (5) that civil penalties in the amount of \$1,000 per violation are improper.

V

Under terms of Section 9.11(a) of PSAPCA Regulation, certain air emissions are prohibited.

(a) It shall be unlawful for any person to cause or allow the emission of any air contaminant in sufficient quantities and of such characteristics and duration as is, or is likely to be, injurious to human health, plant or animal life, or property, or which unreasonably interferes with enjoyment of life and property.

This formulation parallels the definition of "air pollution" contained in the State Clean Air Act at RCW 70.94.030(2). The language is similar to the traditional definition of a nuisance. See RCW 7.48.010.

A regulation couched in such terms is consistent with the statute. Cf. Kaiser Aluminum v. Pollution Control Hearings Board, 33 Wn App. 352, 654 P.2d 723 (1982).

Appellant's argument that the citations should be written under another section of PSAPCA's regulations is apparently based on a misconception as to the terms of Section 9.11(a) as presently written. There was no error in citing the County under this section.

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VII

PSAPCA's odor regulation has been adopted by rule. That is what Section 9.11(a) is. Appellant's real complaint here seems to be the lack of a so-called "objective" standard. However, nuisance-type verbal formulae have long been enforced by the courts and are clearly contemplated by the Clean Air Act. See Kaiser Aluminum, supra.

What PSAPCA has not adopted is the odor scale its inspectors sometimes use to rate events. There is, however, no reason why this scale cannot be used as shorthand for evidentiary purposes in attempting to demonstrate violations of the substantive nuisance-type standard.

VIII

It has long been established that this Board cannot answer constitutional questions. Therefore, we express no judgment about King County's constitutionality argument. Yakima Clean Air Authority v. Glascam Builders, 85 Wn.2d 255, 534 P.2d 33 (1975).

IX

Section 3.2(a) of Regulation I has been amended to provide maximum penalty of \$1,000. This was accomplished pursuant to section 2, chapter 255, Laws of 1984. This statutory amendment allows maximum civil penalty up to \$1,000.

X

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

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ORDER


Notice and Order of Civil Penalty Numbers 6127, 6104, 6183, and 6201 issued by PSAPCA are affirmed.

DONE this 7th day of June, 1985.

POLLUTION CONTROL HEARINGS BOARD

 6/6/85
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member


GAYLE ROTHROCK, Vice Chairman

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